No. 14460

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

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Facts.

In his so-called disagreement as to the facts (Appellee's Br. 3), appellee overlooks the fact that the order in this case arose as a result of his filing a motion to dismiss. Accordingly, all the facts alleged by appellant are deemed admitted by appellee and must be accepted, for the purpose of the motion. (*Guessefeldt v. McGrath,* 342 U. S. 308, 310.) Therefore, appellee is bound, for example, by the allegation [R. 7, 14] that the Washington Office of the Department of State approved, on December 18, 1952, the execution by the Vice-Consul in Kobe, Japan

of a Certificate of the Loss of the Nationality of the United States as to appellant on the ground that he had lost his United States citizenship under 8 U. S. C. 801(c) by reason of his service in the Japanese Armed Forces. And while appellee may believe he can prove otherwise, or that plaintiff cannot prove his allegation, this is a matter of fact for the trial.[1] But for the purpose of this case, that is the fact.

The same holds true as to appellee's other disagreements. (Br. 3.)[2]

As to whether the trial court did allow the Supplemental Portions of the Amended Complaint to be filed, we submit, especially in view of the Court's written opinion [R. 22], that no other conclusion is possible.[3]

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[1]"No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled upon averring a claim, to an opportunity to try to prove it." (*Continental Collieries, Inc. v. Shober, Jr.*, 130 F. 2d 631, 635 [C. C. A. 3, 1942].)

[2]The date, March 20, 1953 in appellee's disagreement (a), page 3 of his brief, must be a typographical error. It probably should read November 20, 1952, or perhaps December 18, 1952.

[3]And, as has been previously pointed out (Op. Br. 13) had he not so allowed, it would have been a clear abuse of discretion. This is particularly so since appellee had permitted appellant to come from Japan to Hawaii for the trial, and since appellant had relied upon this permission, had gone to the expense and effort to make the trip and was ready for trial only to be met by appellee's technical objection on the eve thereof. [R. 16.]

ARGUMENT.

I.

The Amended and Supplemental Complaint Does State A Claim Under 8 U. S. C. 903 (Reply to Appellee's Br. 5-7.)

Appellee's discussion in terms of final decision and exhaustion of administrative remedies is irrelevant to the question here at bar; it disregards the language and meaning of 8 U. S. C. 903. That section says nothing about Certificates of Loss of Nationality or necessity for State Department approval of same, or anything like it. The statute is very plain: if a person claims a right as a national and is denied that right by any Department or agency, or executive official thereof on the ground that he is not a national of the United States, he can file his lawsuit. It means that when he goes to the Consulate and claims the right to registration as an American citizen, if the Consulate refuses or does not so register him, he has been denied that right. It was thus put pithily by the Court in *Wada v. Dulles,* No. 14982 (U. S. D. C. S. D. Cal., oral opinion Dec. 21, 1954):

> "He is denied a right if he isn't treated as a citizen by that consul."

So here, when appellant went to the Consulate at Kobe on October 17, 1952 to be registered as an American citizen, the failure by that Consulate to so register him was the denial of a right; it was that refusal or failure to treat him as a citizen which gave him the right to file suit.

We need not speculate as to when, if at all, prior to the actual execution of the Certificate of Loss, it might be said that this failure or refusal took place. It is sufficient, for the purpose of permitting appellant his day in court that the Vice-Consul, on November 20, 1952, *instead of registering appellant as an American citizen residing in Japan,* did not so do but rather executed the Certificate of Loss, on the ground that appellant was not a national of the United States, and sent it to Washington for approval. Certainly, *at that instant,* has there been a denial on the ground set forth in the statute. For, at least at that instant, and thenceforth, has plaintiff not been treated as a citizen. Otherwise, the consulate would have registered him.[4]

Appellee's suggestion (Br. 7) that in executing and forwarding the Certificate of Loss and not registering appellant, the Vice-Consul made no decision, is, we respectfully submit, double talk. He made the decision to not, and he did not, register appellant as an American citizen on the ground that he was not such. That is sufficient.

22 C. F. R. 50.3 does not change the situation. That is merely a directive to the Consular officer as to a report to be made to Washington when such officer comes into possession of certain facts, regardless of whether or not

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[4]Anyone who is familiar with the operation of American Consulates abroad knows that in most instances, Americans, *e.g.* a soldier's wife and children, are registered and their registrations renewed in a very minimum of time, usually the very day of their appearances at the Consulates.

the person is making a claim as an American national. The regulation has no bearing on the question of whether or when the Consular officer has denied a right to a person before him who claims American Nationality. Nor do *Dulles v. Lung,* 212 F. 2d 73 nor *Ling Share Yee v. Acheson,* 214 F. 2d 4 assist appellee. In the case at bar, as distinguished from the *Lung* case, there is a specific allegation that the Vice Consul refused and did not register appellant precisely on the ground that he was not a national of the United States. And, as distinguished from the *Ling Share Yee* case, there was here no withholding of action pending furnishing by appellant of additional evidence. Here the Vice-Consul had all the evidence he wanted, and based on it, he refused to and did not register appellant. *Cf. Lee Wing Hong v. Dulles,* 214 F. 2d 753, 756 (C. A. 9, 1954) where in response to a similar argument by appellee, the Court said:

> "The essence of all this argument is that the American Consul at Hong Kong did not deny a right or privilege claimed by plaintiff, that is, to have a passport issued, without which they could not come to the United States, but that the Consul's action was only a refusal in his discretion to issue the same because of what he regarded as insufficient proof of identity. We think this is a supercilious argument that it could be made in any case where a citizen, while abroad, was denied a passport so that he might return to this country. Nothing more would be required than that the Consul refuse to issue a passport on the issue of identity. The argument that a refusal to issue a passport because of insufficient proof of identity is not a denial within the meaning

> of the statute of the right or privilege claimed by plaintiffs is without support, either in reason or common sense. . . ."

Appellee is mistaken in attributing (Br. 8) appellant's argument to mean that the approval by the Department of State in Washington is *the* denial. We agree that the Certificate of Loss itself need not necessarily be the denial. The initial denial in this case was the Vice-Consul's refusal to register appellant as an American citizen. This he did, at least by November 20, 1952. We do say, however, that the execution of the Certificate of Loss as well as the approval of the same later in Washington is strong evidence which proves the refusal, and, therefore, the denial.

In the light of the decision in *Lee Wing Hong,* 214 F. 2d 753, *supra,* appellee's efforts (Br. 9) to distinguish this court's language in *Wong Wing Foo v. McGrath,* 196 F. 2d 120 and *Acheson v. Kuniyuki,* 189 F. 2d 741 are of no avail. Nor does appellee's citation of *Re Katsumi Yoshida,* 113 Fed. Supp. 631 assist him. That decision was decided by the same judge who decided the instant case. Moreover, that decision is clearly inconsistent with the recent decision of the United States Supreme Court in *United States v. Menasche,* ..... U. S. ....., 99 L. Ed. (Adv. Op.) 432.

Additionally, the case at bar, being here on a motion to dismiss, the facts being those appearing in appellant's allegations, appellee is incorrect in saying (Br. 10) that the registration was refused on March 20, 1953. At the

most, that is appellee's claim. Appellant alleges otherwise. [November 18, 1952, or, at the lastest, December 18, 1952; R. 7, 14.] He is entitled to his day in court on his claim.

II.

The Supplemental Matter (Reply to Appellee's Br. pp. 10-11.)

If appellee is correct, and as pointed out above, we submit he is not, that action on the Certificate of Loss is not effective until the Department of State approves same in Washington, then even so, appellant's allegation that this was done on December 18, 1952, obviates any disability which may, incorrectly, we submit, be claimed because of the effective date of the Immigration and Nationality Act of 1952. This action by Washington was certainly "during the life of the remedy." (Appellee's Br. 10.)

III.

The Supplemental Portion of the Amended Complaint Was Properly Allowed (Reply to Appellee's Br. pp. 11-12).

As previously pointed out (Op. Br. 13) appellee's argument that the Supplemental Portion of the Amended Complaint alleging the December 18, 1952 action by Washington, should not have been allowed, is an argument of a small minority and has been thoroughly discredited.

IV.

A Citizen Need Not Be First Notified That the Consul Has Refused to Register Him as a Citizen Before He Has Been Denied the Right to Be So Registered (Reply to Appellee's Br. pp. 12-14.)

Appellee reads 8 U. S. C. 903 as though it said the only way a citizen can be denied a right as a citizen is if he receives notification that a Certificate of the Loss of the Nationality of the United States has been issued or approved as to him. Indeed he goes further. He says (Br. 13) that the Certificate must actually be delivered to the applicant.

There is no justification for so narrow a reading of the statute. Appellee overlooks the fact that what is involved here is a denial of a right as an American national, *any* right as such; here, the refusal to register appellant as a United States citizen. The statute requires *only* that there *be* the denial. It does not read, and there is no warrant for interpolating it to read, there must be notification or delivery of a document.

The crucial question is the factual one: has there been a denial. If there has been and there has been here, or at last it is so alleged, that is sufficient.

V.

The 1952 Act (Reply to Appellee's Br. pp. 14-17).

We believe that appellee's argument in this regard is answered by the recent decision of the Supreme Court in *United States v. Menasche,* ..... U. S. ..... 99 L. Ed. (Adv.) 432. We believe this to be so not only because of the actual holding of the case, but also because of the language and rationale of the court's discussion.

It should be pointed out, moreover, that the savings clause of the 1952 Act comes into play here, not because of any "events which occurred after the (1940) statute is repealed" (Appellee's Br. 17), but because of the erroneous view of the trial court [R. 23] that "the Savings Clause presupposes a *valid* suit, or a *valid* action" (Italics added). And that because "the original complaint is a nullity, . . . there is nothing to save."

We submit such an interpretation of the savings clause, especially in view of the *Menasche* case, is entirely unwarranted and amounts to a judicial amendment of the statute. Without again going into the question as to whether the original complaint stated a claim,[5] a "suit, action, or proceeding" had been filed and was "existing at the time" the 1952 Act took effect. As such, under the savings clause, it was entitled to the same treatment as any other suit, action or proceeding. This, because by the savings clause Congress did not merely save from extinction a remedy provided under the repealed statute, "it saved the statute itself." (*De La Rama Steamship Co. v. United States,* 344 U. S. 386, 389.)

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[5]We submit that the only conceivable defect in the original complaint [R. 3-6] is the absence of an allegation that the delay was occasioned on the ground of the Consulate's view that appellant was not a national of the United States. This absence is easily supplied by amendment, and was so supplied in the amended complaint. [R. 6.] The absence of the allegation certainly does not make the suit a "nullity," as the trial court felt [R. 23], otherwise every suit in which there is a technically defective pleading would be a nullity. To so interpret the office of pleadings would make meaningless Congress's carefully chosen words and efforts in the savings clause.

VI.

The Amended Complaint States a Claim Showing Jurisdiction Over the Subject Matter (Reply to Appellee's Br. p. 17.)

This matter has been covered above.

Conclusion.

The order of dismissal should be set aside and the case permitted to proceed to trial.

Respectfully submitted,

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